SHAHEEN BT ABU BAKAR

v.

PERBADANAN KEMAJUAN NEGERI SELANGOR & 2 OTHER CASES

COURT OF APPEAL, KUALA LUMPUR
TUAN SRI GOPAL SRI RAM JCA
DATO' SITI NORMA YAAKOB JCA
DATO' ABDUL MALEK AHMAD JCA
[APPEAL NO. B-02-422-95]
5 FEBRUARY 1996

CIVIL PROCEDURE: *Order 89 Rules of the High Court 1980 - Summary possession of land - Invocation of Order - Whether Order could only be invoked by registered proprietors of land - Locus standi - Proper test - Whether question of standing must relate to right to possession.*

CIVIL PROCEDURE: *Order 89 Rules of the High Court 1980 - Summary possession of land - Ouster elements - Prerequisites for exclusion of summary jurisdiction.*

CIVIL PROCEDURE: *Order 89 Rules of the High Court 1980 - Summary possession of land - Case contested upon affidavit evidence - All evidence on relevant issues put before Court - Whether trial Judge duty bound to make decision thereupon - Question of burden of proof - Whether irrelevant.*

The three appellants, together with some others, were the occupants of state land situate in the district of Petaling, Selangor. In 1992, following alienation of the land to Perbadanan Kemajuan Negeri Selangor (PKNS), proceedings for vacant possession were begun against the appellants. In consequence, upon recourse to the summary procedure of O. 89 Rules of the High Court, 1980 orders of possession against the appellants were obtained by PKNS and its joint venture company. The three appellants, who refused to vacate, had initially succeeded in setting aside the *ex-parte* orders, but all the same, orders of possession were made by the Court after the summonses were reheard.

In this appeal, the appellants argued that the learned Judge ought to have refused the orders for possession because (i) the respondents were not registered proprietors and therefore lacked *locus standi* to approach the Court for relief under O. 89 (ii) Order 89 has placed the burden of proving the absence of consent or licence on the respondents, and that burden has not been discharged (iii) the affidavits of the respondents, filed in support of the summonses, did not comply with the requirements of O. 89, especially r. 3 thereof.

Held:

Per Gopal Sri Ram JCA (delivering the judgment of the Court):

[1] Order 89 does not stipulate that only a registered proprietor may invoke its provisions. In fact the Order is silent on the issue of standing and therefore leaves it to the Court to determine, according to the facts of each case, whether a particular plaintiff has standing to make an application.

[2] Rule 3(a) of O. 89 merely requires that the person claiming possession of land should state his interest in the land in question. Once this is done, it is for the Court to decide whether the interest disclosed is sufficient to support the claim for possession.

[3] The test of standing that is to be applied in cases under O. 89 is one based upon a right to possession. The question that has to be asked is whether, given the peculiar circumstances of the particular case, the plaintiff has a right to possession of the land. An affirmative answer may be provided even in cases where the plaintiff is not the registered proprietor of the land, possession of which he is claiming. On the other hand, cases may arise where a negative response has to be given to the very question, although the plaintiff is the registered proprietor of the land.

[4] In this case the learned Judge had a careful scrutiny of the evidence before coming to the conclusion that, although neither of the respondent was the registered proprietor of the land, each had standing to apply under O. 89 because they were beneficially entitled to it by reason of the letter of 7 July 1992. The learned Judge was entirely right in so holding, although it would be better for him to use the expression "right to possession" instead of "beneficial". Clearly, this is an example of a case where more than one person has the right to possession vested in him.

[5] The present case is not a case in which the defendant made a submission of no case to answer at the close of the plaintiff's case, arguing that the burden of proof has not been discharged. This is a case involving the summary jurisdiction of the Court in which the contest was upon affidavit evidence. That being so, to speak of a burden of proof as did Counsel for the appellants, is altogether out of place. In a case where all the evidence upon the relevant issue is before the Judge, questions as to onus or burden become academic.

[6] The affidavits of the respondents had set out the nature of the respondents' interest as required by O. 89 r. 3. And although the said affidavits had not set out the circumstances in which the land had been occupied, narration of such circumstances had been provided for by the appellants. In any case, such non-compliance is not fatal and is curable under O. 2

r. (1) & (2) of the RHC 1980. These apart, the third submission of the appellants had also overlooked the practical realities of the case. Clearly, in a case such as this, the vital question to ask is whether the occupation is lawful or unlawful.

[7] Two elements need be shown in order to oust the operation of O. 89. It must first be shown that the initial entry upon the land was lawful, and secondly, there was in existence express or implied consent or licence on the part of the owner pursuant to which the occupation continued. In respect of the second element, all that need to be shown to exclude O. 89 is that the issue of consent or licence is triable.

[8] The obtaining facts in the present appeals had not excluded the operation of O. 89. There is no doubt that each appellant is a squatter with no occupational rights whatoever over the land. The Judge below was correct in holding that they had neither consent nor a licence to occupy the land. He was therefore right in making the orders for possession in question.

[Appeals dismissed. Orders of trial Judge affirmed]

***[Bahasa Malaysia** Translation of Headnotes]*

***PROSEDUR SIVIL:** Aturan 89 Kaedah-kaedah Mahkamah Tinggi 1980 - Milikan terus tanah - Penggunaan Aturan - Samada Aturan hanya boleh digunakan oleh pemilik tanah berdaftar - Locus standi - Ujian yang wajar - Samada persoalan locus standi harus mempunyai kaitan dengan hak pemilikan.*

***PROSEDUR SIVIL:** Aturan 89 Kaedah-kaedah Mahkamah Tinggi 1980 - Milikan terus tanah - Unsur-unsur penyingkiran - Syarat-syarat duluan untuk menolak ketepi bidang kuasa terus.*

***PROSEDUR SIVIL:** Aturan 89 Kaedah-kaedah Mahkamah Tinggi 1980 - Milikan terus tanah - Kes dicabar berdasarkan keterangan afidavit - Kesemua keterangan berhubung dengan isu-isu relevan dikemukakan di hadapan Mahkamah - Samada Hakim perbicaraan terikat kepada kewajipan untuk membuat keputusan ke atasnya - Persoalan beban membukti - Samada tak relevan.*

Ketiga-tiga perayu, bersama-sama dengan sebilangan yang lain, merupakan penghuni tanah negeri yang terletak dalam daerah Petaling, Selangor. Dalam tahun 1992, berikutan dengan pemberimilikan tanah kepada Perbadanan Kemajuan Negeri Selangor (PKNS), prosiding-prosiding bagi milikan kosong telah dimulakan terhadap perayu-perayu. Berikutan itu, melalui penggunaan prosedur terus A. 89 Kaedah-kaedah Mahkamah Tinggi, 1980 perintah milikan terhadap perayu-perayu telah diperolehi oleh PKNS dan syarikat usahasamanya. Ketiga-tiga perayu, yang enggan mengosongkan tanah berkenaan, telah berjaya pada mulanya untuk mengenepikan perintah-perintah *ex-parte* tersebut, tetapi

namun begitu, perintah-perintah milikan telah dibuat oleh Mahkamah selepas saman-saman tersebut didengar semula.

Dalam rayuan ini, perayu-perayu berhujah bahawa Hakim yang bijaksana seharusnya telah menolak perintah-perintah bagi milikan tersebut kerana (i) responden-responden tidak merupakan tuanpunya berdaftar dan dengan itu tidak mempunyai *locu standi* untuk mengadap Mahkamah bagi mendapatkan relief di bawah A. 89 (ii). Aturan 89 telah meletakan beban membukti ketiadaan persetujuan atau kebenaran ke atas responden, dan beban tersebut gagal dilaksanakan (iii) afidavit-afidavit responden, yang difailkan bagi menyokong saman-saman tersebut, tidak mematuhi kehendak-kehendak A. 89 k. 3.

Diputuskan:

Oleh Gopal Sri Ram HMR (menyampaikan penghakiman Mahkamah):

[1] Aturan 89 tidak menentukan bahawa hanya tuanpunya berdaftar boleh mengguna peruntukan-peruntukannya. Pada hakikatnya Aturan tersebut tidak membangkitkan isu *locus standi* dan dengan itu menyerahkan kepada Mahkamah untuk menentukannya, menurut fakta-fakta kes, samada seseorang plaintiff mempunyai hak untuk membuat satu permohonan.

[2] Kaedah 3(a) A. 89 hanya menghendakki supaya orang yang menuntut milikan tanah seharusnya menyatakan kepentingannya dalam tanah yang dipersoalkan. Sebaik sahaja hal ini dilakukan, ianya adalah terpulang kepada Mahkamah untuk memutuskan samada kepentingan yang didedahkan itu memadai untuk menyokong tuntutan bagi milikan tersebut.

[3] Ujian bagi 'standing' yang harus dipakai dalam kes-kes di bawah A. 89 adalah suatu yang berdasarkan kepada hak milikan. Persoalan yang harus ditanya adalah samada, memandangkan kedudukan anih kes yang khusus ini, plaintiff berhak kepada milikan tanah tersebut. Satu jawapan yang mengiakannya boleh diberikan walaupun dalam kes-kes di mana plaintif bukannya merupakan tuanpunya berdaftar bagi tanah tersebut, yang mana milikannya dituntut. Sebaliknya, kes-kes mungkin berbangkit di mana jawapan yang negatif harus diberikan walaupun plaintiff merupakan tuanpunya berdaftar bagi tanah tersebut.

[4] Dalam kes ini Hakim yang bijasana telah melihat dengan teliti akan keterangan tersebut sebelum mencapai keputusan bahawa walaupun tidak satu pun daripada responden merupakan tuanpunya berdaftar bagi tanah tersebut, setiap satu daripada mereka mempunyai pendirian atau 'standing' untuk memohon di bawah A. 89 kerana mereka berhak secara benefisial kepadanya atas alasan-alasan surat bertarikh 7 Julai 1992. Hakim yang bijaksana adalah betul dalam memutuskan sedemikian, walaupun ianya baik baginya menggunakan ungkapan "right to possession" dan bukannya "beneficial". Jelasnya, ini merupakan satu contoh kes di mana lebih daripada seorang berhak kepada milikan yang terletak hak padanya.

[5] Kes semasa ini bukannya merupakan kes dalam mana defendan telah membuat shujahan mengenai tiada kes untuk dijawab, pada penutup kes plaintif, dengan memberikan penghujahan bahawa beban membukti telah tidak dilepaskan. Ini merupakan kes yang melibatkan bidangkuasa terus Mahkamah dalam mana pertikaian adalah berdasarkan keterangan afidavit. Dalam keadaan yang sedemikian, memperkatakan mengenai beban membukti sepertimana yang dilakukan oleh Peguam bagi pihak perayu, adalah sesungguhnya tidak bersesuaian. Dalam kes dimana kesemua keterangan-keterangan ke atas isu yang relevan terdapat di hadapan Hakim, persoalan berhubung dengan tanggungjawab atau beban menjadi akademik.

[6] Sepertimana yang dikehendaki oleh A. 89 k. 3, afidavit responden telah membentangkan sama sifat kepentingan responden dalam tanah berkenaan. Dan walaupun afidavit tersebut tidak membentangkan hal keadaan bagaimana tanah berkenaan dihuni, halkeadaan tersebut telah diceritakan sendiri oleh perayu-perayu. Walau apapun, ketidakpatuhan sedemikian tidaklah memudaratkan dan boleh dipulih dibawah A. 2 k. 1(1) & (2) KMT 1980. Selain itu, hujah ketiga perayu juga tidak melihat kepada realiti kes. Adalah jelas, bahawa dalam kes seperti ini, soalan penting yang perlu ditanya ialah samada penghakiman berkenaan sah atau pun tak sah.

[7] Dua unsur perlu ditunjukkan untuk menyingkir pelaksanaan A. 89. Pertamanya, adalah harus ditunjukkan bahawa kemasukkan awal ke atas tanah tersebut adalah sah dan keduanya, wujudnya kebenaran yang nyata atau tersirat dari pihak tuanpunya yang mana menyebabkan penghunian itu berterusan. Berhubung unsur kedua, apa yang perlu ditunjukkan bagi menolak A. 89 adalah bahawa persetujuan atau kebenaran tersebut merupakan isu yang boleh dibicarakan.

[8] Fakta-fakta yang diperolehi dalam rayuan semasa ini telah tidak menolak pelaksanaan A. 89. Tidak diragui lagi bahawa setiap perayu adalah merupakan setinggan tanpa hak-hak penghunian apa pun di atas tanah tersebut. Hakim di bawah adalah betul dalam mengatakan bahawa mereka tidak mempunyai persetujuan mahupun kebenaran untuk menghuni tanah tersebut. Beliau adalah dengan itu betul dalam membuat perintah-perintah pemilikan terhadap setiap perayu.

[Rayuan ditolak]

Cases referred to:
Bohari bin Taib & Ors. v. Pengarah Tanah dan Galian [1991] 1 MLJ 343 ***(dist)***
Cheow Chew Khoon v. Abdul Johari bin Abdul Rahman [1995] 1 MLJ 457 ***(dist)***
Seturatnam v. Venkatachela AIR [1920] PC 67 ***(foll)***
Nand v. Gopal AIR [1940] PC 93 ***(foll)***
Sunkyong International Inc. v. Malaysian Rubber Development Corporation Bhd. [1992] 2 MLJ 146 ***(foll)***

Legislation referred to:
Rules of Supreme Court (U.K), O. 113
National Land Code 1965.
Selangor State Development Corporation Enactment 1964, s. 11(a), (d)
Rules of the High Court 1980, O. 2 r. 1(1) & (2), O. 89 r. 3.

Other sources referred to:
English Supreme Court Practice, 1991

For the appellant - Haji Sulaiman bin Abdullah (R. Sivarasa and Wong Poh Leng with him); W.K. Yap, Loo & Co.
For the respondent - K. Kirubakaran; Kiru & Yong

JUDGMENT

Gopal Sri Ram JCA:

Perbadanan Kemajuan Negeri Selangor, or PKNS for short, is a statutory corporation created by the Selangor State Development Corporation Enactment 1964 ("the Enactment"). It has been conferred with numerous powers and responsibilities. Among other things, it is charged with the duty of improving the economic and social well-being of the State. This duty finds expression in subsections (a) and (d) of s. 11 of the Enactment as follows:

> 11. It shall be the duty of the Corporation:
>
> (a) to promote residential, industrial and commercial development of areas in the State designated for this purpose;
>
> ...
>
> (d) to promote, stimulate, facilitate and undertake industrial, social, commercial and economic development and activities in the State of Selangor.

In discharge of these duties, it enters into various ventures for the construction of small and medium cost houses and factories. It needs land in order to accomplish this.

All land in the State of Selangor that is not privately owned is, in accordance with the provisions of the National Land Code 1965 ("the Code") vested in the State. So if PKNS needs to carry out any of its projects, it has to obtain an alienation of land from the State. All this is common knowledge.

On 12 April 1989, PKNS applied to the State for the alienation of about 4000 acres of land in the Mukim of Sungei Buloh, in the District of Petaling. Its purpose in applying for this land was to construct low-cost flats and houses to alleviate the constant shortage of accommodation and also to construct some factories to advance the economic growth of the State.

On 7 July 1992, the Land Administrator for the District of Petaling wrote to PKNS informing it that the State Authority had approved the alienation of the land in question, subject to a number of conditions. PKNS appealed against the imposition of some of these conditions and they were eventually removed. But there were the other conditions which still had to be met. There was the condition that PKNS had to pay the specified alienation fee: and that the land was only to be sold once to the first purchaser. Any further sale was subject to obtaining the consent of the State Authority.

In order to carry out its object, PKNS entered into a joint venture with a private developer. A joint venture company called Punca Alam Sdn. Bhd. ("Punca Alam") was incorporated in which both PKNS and the developer had shares. PKNS then entered into a sale and purchase agreement with Punca Alam under the terms of which it sold the land in question to the latter. Punca Alam paid a deposit to account of the purchase price while awaiting the registration of the alienated title in favour of PKNS.

Now, there was a problem with the land. Although it belonged to the State at all material times, it was not vacant. Vacant possession of the land was essential to enable PKNS and Punca Alam to carry out the proposed housing and industrial development. They were unaware of the identities of the 154 occupants who were on the land. They therefore prayed in aid the summary procedure prescribed by O. 89 of the Rules of the High Court 1980 to obtain possession.

Three separate summonses were taken out. PKNS was the plaintiff in the first while Punca Alam was plaintiff in the other two. Orders for vacant possession were obtained on the summonses against all those in possession of the land. Of the 154 occupants, 151 vacated the land in obedience to the orders. Only the appellants in these three appeals remained in occupation. Two of them applied to the Court and had the *ex parte* orders for possession set aside. The order against the third was also set aside although he was originally represented by Counsel when the summons for possession was heard. All three summonses were then reheard before James Foong J who, after hearing arguments, made orders of possession against each of the appellants. It is against those orders that the present appeals have been brought.

Although there are some facts peculiar to each appeal, they all concern the same piece of land, have many other common facts and raise identical issues of law. The appellants are all represented by the same Counsel. The respondents too have common representation. Hence, when these three appeals came up for hearing on 23 January 1996, they were, with the consent of Counsel, heard together. For the reasons given, this seemed the most convenient course to take.

So much for the background.

I must now turn to the submissions made in support of these appeals. However, since all the arguments of Counsel gravitate around O. 89, I think that I ought to first set out its provisions.

Order 89, which is headed "Summary proceedings for possession of land" is in the following terms:

> 1. Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this order.
>
> 2. The originating summons shall be in Form No. 8A and no acknowledgment of service shall be required.
>
> 3. The plaintiff shall file in support of the originating summons an affidavit stating:
>
> (a) his interest in the land;
>
> (b) the circumstances in which the land has been occupied without licence or consent and in which his claim to possession arises; and
>
> (c) that he does not know the name of any person occupying the land who is not named in the summons.
>
> 4. (1) Where any person in occupation of the land is named in the originating summons, the summons together with a copy of the affidavit in support shall be served on him:
>
> (a) personally or in accordance with O. 10 r. 5; or
>
> (b) by leaving a copy of the summons and of the affidavit or sending them to him, at the premises; or
>
> (c) in such other manner as the Court may direct.
>
> (2) The summons shall, in addition to being served on the named defendants, if any, in accordance with para. (1) be served, unless the Court otherwise directs, by:
>
> (a) affixing a copy of the summons and a copy of the affidavit to the main door of other conspicuous part of the premises; and
>
> (b) if practicable, inserting through a letter-box at the premises a copy of the summons and a copy of the affidavit enclosed in a sealed envelope addressed to "the occupiers"

(3) Every copy of the originating summons for service under paras. (1) and (2) shall be sealed with the seal of the Court out of which the summons was issued.

(4) Order 28 r. 3 shall not apply to proceedings under this order.

5. Without prejudice to O. 15 rr. 6 and 10, any person not named as a defendant who is in occupation of the land and wishes to be heard on the question, whether an order for possession should be made may apply at any stage of the proceedings to be joined as a defendant.

6. (1) A final order shall not be made on the originating summons except by a Judge in person and shall, except in case of urgency and by leave of the Court, not be made less than 5 clear days after the date of service.

(2) An order for possession in proceedings under this order shall be in Form No. 193A.

(3) Nothing in this order shall prevent the Court from ordering possession to be given on a specified date, in the exercise of any power which could have been exercised if possession had been claimed in an action begun by writ.

7. (1) Order 45 r. 3 (2) shall not apply in relation to an order for possession under this order but no writ of possession to enforce such an order shall be issued after the expiry of three months from the date of the order without the leave of the Court.

8. The Judge may, on such terms as he thinks just, set aside or vary any order made in proceedings under this order.

Tuan Haji Sulaiman of Counsel for the appellants advanced three primary submissions in support of the appeals. His first submission is that this was not a case which came within O. 89 because both PKNS and Punca Alam lacked standing to move the Court under that Order. They are not, he said, the registered proprietors of the land. Even if his clients were in illegal occupation of the land (which he did not concede), they could still call upon the respondents in these appeals - PKNS and Punca Alam - to prove that they had the right to invoke the order.

Second, he submitted that it was for the respondents to satisfy the Court that the former were on the land without the licence or consent of the latter's predecessor in title - the State Government of Selangor. No evidence had been led to prove this. The appellants had, on the other hand, adduced evidence which pointed to quite the opposite conclusion. The Judge, he argued, ought therefore to have dismissed the summonses and left the respondents to commence an ordinary action for possession by way of writ.

The third submission of Counsel for the appellants is that both principle and authority require strict compliance with the terms of O. 89. If there is any omission in this respect, then the application is doomed to failure. He says that the affidavit in support of each summons did not meet the requirements of O. 89 r. 3. The Judge should have therefore refused the relief asked for.

Now, O. 89 has its origins in the English RSC. O. 113 with which it is in *pari materia*. Cases decided in England and the comment upon the corresponding English rule of Court are therefore of assistance when considering the scope and application of O. 89. But in the final analysis, Courts in this country must bear in mind the peculiar circumstances that prevail here and should therefore apply the order to meet these circumstances.

In my judgment, it would be quite wrong for our Courts to apply, without question or qualification, the views expressed by English Judges or commentators, however eminent, to cases that arise before them under parallel provision of written law without addressing the circumstances that prevail in this country. Especially is this so in cases involving the practice and procedure of our Courts, where the approach that we adopt may be at variance with that followed by Courts of England.

Of course, if a view of the law that we take on a particular subject is similar to that expressed in an English case, it would be quite proper to cite that decision as authority for the proposition stated. But there should be no slavish adherence to English precedent.

I have made these observations because we were during argument, referred by Counsel to a commentary by the editors of the *English Supreme Court Practice, 1991* on the English RSC O. 113 dealing with the scope of the order and the way in which it should be applied. The views expressed in the passages that were read by Counsel are unsupported by any authority.

I certainly do not consider myself bound by these views and the course I propose to take is to make up my own mind about how O. 89 is to be applied, having regard to any judicial pronouncements of our Courts in cases where the order has come up for consideration. There may, consequently, be a difference in the approach I take and that suggested by the editors of the *Supreme Court Practice*, but this is inevitable because of the circumstances that prevail in our jurisdiction.

With that I now turn to consider Counsel's first submission. To recall, it is to the effect that the respondents are not registered proprietors and therefore lack *locus standi* to approach the Court for relief under O. 89.

The obvious answer to this submission is, I believe, to be found in the words of the order itself. Order 89 does not stipulate that only a registered proprietor may invoke its provisions. In fact, the order is silent on the issue of standing

and therefore leaves it to the Court to determine, according to the facts of each case, whether a particular plaintiff has standing to make an application.

Rule 3 (a) of O. 89 merely requires that the person claiming possession of land should state his interest in the land in question. Once this is done, it is for the Court to decide whether the interest disclosed is sufficient to support the claim for possession.

The example given by Counsel for the appellants during argument sufficiently illustrates the flexibility of approach called for by O. 89. He said that if a tenant left premises unattended for some time and an unauthorised person entered into possession, the former would, in reliance upon his right to enjoyment of possession, be entitled to move the Court under O. 89. Perhaps the landlord may also have concurrent standing to bring the action. Other illustrations could be given with no real benefit in point of principle. It depends upon the facts of each case.

In my judgment, the test of standing that is to be applied in cases under O. 89 is one based upon a right to possession. The question that has to be asked is whether, given the peculiar circumstances of the particular case, the plaintiff has a right to possession of the land. An affirmative answer may be provided to that question even in cases where the plaintiff is not the registered proprietor of the land, possession of which he is claiming.

At the other extreme, cases may arise where a negative response may be drawn to that very question, although the plaintiff is the registered proprietor of the land. Such a response may be due to the fact that the registered proprietor has parted wholly with his right to possession to some other person, in which event, it would be that other person who would have standing to commence proceedings. As I earlier said, it all depends on the facts of each case.

The Court must in each case undertake a careful examination of the facts and determine in whom the right of possession resides. If it is with the particular plaintiff, then, he has standing. If it lies elsewhere, then there is no *locus standi*.

In the present appeals, the learned Judge did undertake a careful scrutiny of the evidence. He then came to the conclusion that, although neither respondent was the registered proprietor of the land, each had standing to apply under O. 89 because they where beneficially entitled to it by reason of the letter of 7 July 1992. He was criticised by Counsel for arriving at this finding. Perhaps the use of the expression “beneficial” was unfortunate. It may have been better to use the phrase “right to possession”. But, I do not perceive that the result to be affected by the turn of phrase employed by the Judge.

To pursue the course suggested by Counsel can only lead to a fruitless exercise in semantics. What is important is whether the evidence shows the respondents to have the right to possession. I think that it does. This is an example of a case where more than one person has the right of possession vested in him. In my judgment, the learned Judge was entirely right in holding that, on the facts before him, the respondents had the necessary standing.

What I have said thus far would also answer the other point raised by Counsel, namely, that the plan annexed to PKNS' affidavit shows the portion occupied by the first appellant (Shaheen bt. Abu Bakar) to be within the area sold to Punca Alam. This approach overlooks the practical realities of the case.

Punca Alam is, as earlier pointed out, the joint venture vehicle by which PKNS intends to bring development to the area in question. In a case like this, it is of no practical consequence which portion of the land she occupies. The vital question is whether the occupation is lawful or unlawful. And that brings me to counsel's second submission.

Counsel has, in his second submission said that O. 89 has placed the burden of proving the absence of consent or licence upon the respondents. He has gone on to suggest that, on the evidence produced by the respondents, that burden has not been discharged. Before I deal with this submission, it is necessary to discuss what I regard as high authority upon the issue raised by Counsel.

It is the decision of the Supreme Court in *Bohari bin Taib & Ors. v. Pengarah Tanah dan Galian* [1991] 1 MLJ 343 where the scope and application of O. 89 was considered. Mohamed Azmi SCJ who delivered the judgment of the Court, explained in such simple language the approach that ought to be taken that I find it necessary to quote from his judgment *in extenso*:

> In our view, the appellants in this particular case have sufficiently shown by affidavit evidence that they have an arguable case in that they and **some, if not all, of the other farmers have occupied the land for three years under licence and thereafter have remained in occupation with the continued consent of the state government by virtue of the 1980 alienation already approved prior to the TOLs.** The learned State Legal Adviser, Encik Hishamuddin for the respondent, pointed out that the TOLs and therefore consent were given only up to 1983. After that no TOL was issued, thus indicating absence of consent. In our view, the alleged continued consent of the State Government to their occupation notwithstanding the expiry of the TOLS, is one of the serious issues to be tried. **The case for the appellants is that they were already in occupation with consent prior to 1981 and the grant of TOLs from 1981 to 1983 is merely part of the chain of events supporting the existence of an approval of alienation of the lands to them by the state authority under s. 42 of the National Land Code 1965, and pending issue of titles under s. 77(2) they are entitled to remain on the land not as squatters but as of right. The approval of the state authority as exhibited**

by the appellants, would appear to have been made on 4 September 1980, according to the letter of the Collector of Sabak Bernam dated 25 October.

In allowing the respondent's application under O. 89, the learned Judge had relied almost entirely on the *LESCO* case (*Government of the State of Negeri Sembilan & Anor. v. Yap Chong Lan & Ors.* [1984] 2 MLJ 123) and *Sidek's* case (*Sidek bin Hj. Muhamad & Ors. v. Government of the State of Perak & Ors.* [1982] 1 MLJ 313). With respect, these two decisions of the Federal Court are no authorities for the scope and application of O. 89. **In our opinion, for the purpose of the summary procedure, a distinction should be made between squatters simpliciter who have no rights whatsoever, and occupiers with licence or consent, and as well as tenants and licensees holding over. It may be impossible to establish the existence of any triable issue in the case of bare squatters, but the position of tenants and licensees holding over, or persons occupying with implied or expressed consent of the owner may be different. On the facts, we hold that there are triable issues on the absence of either licence or consent as alleged by the respondent.** Evidence *viva voce* is required not only on the alleged consent of the respondent to the appellant's occupation rendering their entry lawful, but also on whether the approval of the state authority to the alienation of the lands to the appellants and the other occupiers had been given in 1980 under s. 42 of the National Land Code 1965.

...

Finally, it has come to our knowledge that recently in *Mohd Rawi bin Yaacob v. Federal Land Development Authority*, another panel of this Court (Abdul Hamid LP, Gunn Chit Tuan, and Jemuri Serjan SCJJ), had in allowing an appeal held that **where the entry to the land is lawful, and where there are triable issues, O. 89 is not the proper procedure to be adopted to evict occupiers by order for possession.** (Emphasis added).

It may be seen from the passage quoted above that there are two elements (which I shall for convenience refer to as "the ouster elements") that oust the operation of O. 89. They are as follows:

(1) The initial entry upon the land must be lawful; and

(2) The existence of any express or implied consent or licence on the part of the owner pursuant to which the occupation continued.

In respect of the second element, all that need be shown to exclude O. 89 is that the issue of consent or licence is triable. Once triable issues in respect of element (2) are shown, the summary jurisdiction is ousted.

One other point of principle emerges from a reading of his Lordship's judgment in *Bohari's* case. It is that the question whether the ouster elements exist in a given case depends upon its particular facts.

As it happened, the facts in *Bohari's* case were unusually strong. They disclosed a legitimate expectation in the appellants, encouraged by the State Government, that titles would be issued in respect of the lots occupied. The fundamental issue in that case was the absence of a licence or consent to occupy. (See, [1991] 1 MLJ at p. 344, right column, last sentence.) The assurances, both explicit and implied, given by the State Government to Bohari and his co-appellants were a sufficient indicia of consent or a licence to occupy the land pending the issue of titles to the occupants of the 515 lots. The facts of that case certainly took it out of the summary jurisdiction conferred by O. 89.

In *Cheow Chew Khoon v. Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457, 479-480 I called attention to the necessity of there being strict compliance with the terms of O. 89 in the context of that provision being abused by a landlord against a tenant holding over after the expiry of his tenancy. However, as will transpire, what I said there has no application to the facts of this case. Put simply, these appeals do not concern tenants holding over.

Returning now to Counsel's submission on the burden of proof point, it is pertinent to observe that this is not a case in which the defendant made a submission of no case to answer at the close of the plaintiff's case, arguing that the burden of proof had not been discharged. That is a case involving the summary jurisdiction of the Court in which the contest was upon affidavit evidence. I cannot help thinking that to speak of a burden of proof in a case such as the present is altogether out of place.

I am very much alive to the fact that the order of possession which the Judge is empowered to make in the present case is a final order. But so are the orders which are made in the exercise of other summary powers, such as those conferred by O. 14 or O. 18 r. 19. Surely, this consideration alone, upon which Counsel placed so much reliance, cannot lend any significance to the issue of the burden of proof.

In a case where all evidence upon relevant issues is before the Judge, questions as to onus or burden become academic. See, *Seturatnam v. Venkatachela* AIR [1920] PC 67; *Nand v. Gopal* AIR [1940] PC 93.

Both sides having put in their evidence, it was incumbent upon the Judge to consider these and to come to a conclusion one way or the other upon the issues on which a joinder had been raised. Hence, to require him to shut his eyes to the evidence before him and to decide the case purely upon the burden of proof would be a grave error in principle. This is therefore a case where:

> The controversy had passed this stage at which discussion as to the burden of proof was pertinent; the relevant facts were before the Court, and all that remained for decision was what inference should be drawn from them. (per Sir Lawrence Jenkins in *Seturatnam v. Venkatachela* (*supra*) at p. 69)

Consequently, all that is now necessary is to examine the facts of the present appeals to ascertain whether they exclude the operation of O. 89. Since the facts relating the occupation by each appellant differ, I propose to examine them separately.

Let me take the case of Shaheen bt Abu Bakar, the first appellant.

Her evidence is that in 1982, her father, acting upon the encouragement of the Penghulu of Mukim Sungei Puluh, entered onto the land in question. In 1983, the father built a house on the land. In the following two years, her father and the other occupiers commenced fish farming. They received assistance from the Department of Agriculture and Fisheries, who no doubt were unaware, or at the very least unconcerned, with the legality of the father's occupation of the land in question. Shaheen goes on to say that in 1995, the father "gifted" the property to her. She says that the State constructed a Surau on the land with public funds although I must say that the document she relies upon - a voucher from the Petaling District Office - speaks, not of construction but of repairs and renovation done to an existing Surau.

These are then the circumstances upon which Shaheen relies to support her allegation that her initial entry upon the land and her continued occupation of the same way lawful. By no stretch of the imagination may a parallel be drawn between her case and that of *Bohari* (*supra*). There is, in the present case, no active encouragement of the kind that was found to exist in *Bohari's* case. No promise to issue title to her or her father was ever made by the State Government. Nor were there any actings on the part of the State Authority which may be capable of even remotely suggesting the existence of consent or a license. Unfortunately for her, Shaheen and her father remain what they always were: squatters on state land.

The next case is that of the second appellant, Ho Choong Yee.

This appellant came onto the land in 1980, when she purchased a house built on it. The vendor of the house, one Ho Yan, came onto the land in 1976. In her evidence, she goes on to say that she expended money in practically rebuilding the house and converting it into a permanent structure. In May 1987, she applied for a temporary occupation licence but was not issued with one. This is all that she has asserted in support of her case.

It is more than plain to me that the second appellant has established absolutely no basis for making the suggestion that she does: that her possession of the land is with the consent or by the licence of the State Government and PKNS. Her entry upon the land was illegal as is her continued occupation of it. As a squatter, it is not open to her to resist a summary application for possession. There is no suggestion that planning permission was ever obtained for the house she re-built.

It is an illegal structure, as are no doubt the houses of the other appellants.

I now take the case of the third appellant, Lee Yat Yee.

His case is that he went into possession of this land in 1969. He applied for a temporary occupation licence ("TOL") and was issued one, but in the name of his neighbour. In 1988, he had the TOL issued in his name. It expired in 1991 and has never been renewed since then. There is no suggestion by Mr. Lee that the State Authority led him to believe that his TOL would be enlarged into a greater interest in the land. Neither is there any suggestion that, apart from the grant of the TOL, there was a definite promise to issue him with a title to that portion of the land he occupies.

Based on the foregoing facts, I am unable to find any material from which the Judge could have inferred either consent or a license to occupy the land in question. Mr. Lee, like the other appellants, is also a squatter with no rights whatsoever.

This brings me now to the third and last submission of Counsel. It has to do with the state of the respondents' affidavits filed in support of their summonses for possession. He says that these affidavits are in hopeless disorder because they do not comply with r. 3 of O. 89. I will deal with each point of complaint.

First, he says that there is no description of the nature of the respondents' interest. That is not quite correct because the respondents' affidavits do set out the nature of their respective interest in the land. Counsel went on to complain that the respondents had not alleged that PKNS had paid the alienation fee and met the other conditions set out in the letter of approval. That is, with respect quite irrelevant. Once PKNS had stated its interest, it was up to the appellants to inquire from the State Authority and determine if the payments had been made. I see no difficulty in the appellants getting in that information and placing it before the Court. There is therefore nothing in the first complaint.

Second, Counsel has submitted that O. 89 r. 3(b) was not complied with because the respondents failed to set out the circumstances in which the land has been occupied. That is quite true. But the appellants have told us how each of them came onto the land. I cannot see how, in the circumstances of this case the noncompliance has resulted in any prejudice to the appellants. The non-compliance is not fatal and is curable under O. 2 r. 1(1) and (2) of the Rules of the High Court 1980: see, *Sunkyong International Inc. v. Malaysian Rubber Development Corporation Bhd.* [1992] 2 MLJ 146, at p. 150.

Counsel has, however, relied on the following passage in the judgment of Mohamed Azmi SCJ in *Bohari* (*supra*), at p. 346 to support his argument that r. 3(b) requires strict compliance of its terms:

> In this case, we also find that the respondent has failed to comply with r. 3(b) of O. 89 by its failure to disclose fully in its affidavit-in-support, the whole of the relevant circumstances how the lands came to be occupied by the appellants both before and after the three-year period of the TOL, and why the approval of the State Executive Council to the alienation of the lands to the farmers as contained in the Collector's letter of 25 October 1980, was neither exhibited not implemented.

It is of vital importance that the foregoing passage be read in the context of his Lordship's earlier observations on the conduct of the State Government. That was a case where the State had applied for the relief without disclosing the written assurance it had given that titles would be issued and had failed to explain why this had not been done. In other words, there had been a suppression of material facts on the part of the Pengarah Tanah dan Galian in the presentation of his case. Small wonder, then, that the Supreme Court expressed its disapproval.

The present appeals are a far cry from the situation in *Bohari*. There has been no suppression of any material fact that goes to prove consent or a licence to occupy. There has been sufficient disclosure by the respondents of all the necessary facts.

The complaint of Counsel is accordingly without merit.

Thirdly, Counsel submits that there has been a failure to comply with r. 3 (c) of O. 89. The respondents have not stated that they do not know the names of the occupants of the land. That is quite true. But this point was never raised before the Judge at the hearing of the summonses. Had this been done, the respondents might have sought an adjournment and rectified the omission.

Tuan Haji Sulaiman, however, says that this could not have been done. According to him, every application under O. 89 must be the epitome of perfection. Once there is an omission, however slight and inconsequential, the application must be dismissed out of hand and without more. If that be the case, then, it would be far better for a robot to hear applications under the Order. There would be no question of any discretion being exercised or any error being overlooked.

But Courts are manned by Judges who are human and not by robots. They exist to serve the ends of justice and not to act mechanically with no application of the mental faculty. The injustice that would result in adopting the approach suggested by Counsel provides the answer to the point he has taken.

The upshot is that there is nothing in the procedural points taken by the appellants.

In conclusion, there is no doubt that each appellant is a squatter with no occupational rights of any kind. The judge was quite correct in holding that they had neither consent nor a licence to occupy the land. He was therefore right in making the orders for possession against each appellant.

For the reasons given, all three appeals are dismissed and the orders made by the learned Judge are affirmed. The respondents will have the costs of each of these appeals and these shall be taxed under separate bills filed in each appeal. The orders of this Court staying execution of the orders of the Judge are hereby vacated. The deposit paid into Court shall be paid out to the respondents to account of their taxed costs.

My learned sister, Siti Norma Yaakob JCA, has seen this judgment in draft and agrees with the reasoning and the conclusions therein.

Abdul Malek Ahmad JCA:

I have had the benefit of reading the draft judgment of my learned brother Gopal Sri Ram JCA. I agree with the reasons and conclusions expressed therein.

Reported by W.A. Sharif